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 Before the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 92-7

In the Matter of

Amendment of Section 73.202(b), RM-7879
 Table of Allotments,
 FM Broadcast Stations.
 (Scotland Neck and Pinetops,
 North Carolina)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1995; Released: October 11, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Radio Triangle East Company, licensee of Station WSAY-FM, Rocky Mount, NC ("petitioner") of our *Report and Order*, 7 FCC Rcd 5113 (1992), in this proceeding. Comments in opposition were filed by WYAL Radio, Inc., permittee of Radio Station WWRT(FM), Channel 238A, Scotland Neck, North Carolina ("WWRT").¹

2. *Background.* In the underlying *Report and Order* ("R&O") the Chief, Allocations Branch, upgraded Channel 238A for Channel 238C3 at Scotland Neck, reallocated Channel 238C3 to Pinetops, NC, and modified the license of Station WWRT(FM) to specify Pinetops as its community of license in response to a rulemaking petition filed by WWRT. He granted WWRT's proposal because this would result in a first local aural transmission service for Pinetops. In so doing, he found that Pinetops was sufficiently independent of the Rocky Mount, NC urbanized area to warrant a first local service preference² and that Pinetops should not be credited with the aural transmission services licensed to Rocky Mount. While Scotland Neck would lose its only local nighttime transmission service, the R&O stated that both daytime and fulltime AM services constitute local aural transmission services for purposes of

changes in community.³ Finally, the R&O noted that Scotland Neck would continue to enjoy reception service from one AM and seven FM stations and WWRT(FM) would be able to serve a larger area and population, including Scotland Neck.

3. *Petition for Reconsideration.* Petitioner raises essentially two issues. First, petitioner argues that, for purposes of determining the interdependence of Pinetops from Scotland Neck, it was inappropriate for the R&O to rely upon hearsay statements made by a consulting engineer who had no personal knowledge of the matters that he attested to, citing *Robert B. Taylor*, 7 FCC Rcd 3142 (1992) in support.⁴

4. Second, petitioner argues that it was error to conclude that Pinetops was sufficiently independent from Rocky Mount to warrant a first local service preference. Petitioner states that even with the information provided, it would only show that Pinetops is a community for allotment purposes, it would not demonstrate its independence from Rocky Mount nor its entitlement to a first local service preference, citing *Fairfield and Norwood, Ohio*, 7 FCC Rcd 2377 (1992). Petitioner contends that when the Commission applies the criteria established in *RKO General, Inc.* ("KFRG"), 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck* ("Tuck"), 3 FCC Rcd 5374 (1988) to determine whether to attribute the Rocky Mount transmission services to Pinetops the Bureau on reconsideration must conclude that it erred in this case.⁵

5. Regarding, the first of these criteria, signal population coverage, petitioner states that by virtue of the limitations placed on the transmitter site for Channel 238C3 at Pinetops, 100 percent city-grade coverage of the Rocky Mount Urbanized Area is assured. Petitioner contends that under the second criteria regarding the size of the community relative to the adjacent city, several factors must be considered to determine whether the community is entitled to a first local service preference, and location within an urbanized area is but one of several components. Petitioner claims that the adjacency of Pinetops and Rocky Mount must be considered in conjunction with the fact that Rocky Mount is more than 30 times larger than Pinetops in population. Under the third criteria concerning the interdependence of the suburban community with the central city, petitioner reiterates that Pinetops does not have its own telephone directory and that information cuts against a finding that Pinetops is independent from Rocky Mount. Petitioner claims that WWRT submitted no evidence regarding work patterns of Pinetops residents, media services, or statements from local political and civic leaders, citing *Fairfield and Norwood, Ohio, supra*. In light of the above, petitioner contends that the community of Pinetops is not

¹ After the record closed in this proceeding WWRT filed a motion to strike petitioner's reply comments on the grounds that the comments were untimely filed. Petitioner opposed the motion. We agree with petitioner that its reply comments were timely filed pursuant to Sections 1.4(b) and 1.429 of the Commission's Rules instead of Section 1.45 as argued by WWRT. Therefore, petitioner's reply comments will be accepted.

² The R&O noted that Pinetops had its own local government, police and fire services, businesses, civic organizations and religious institutions which identify themselves with Pinetop.

³ See *Amendment of the Commissions Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990).

⁴ We believe petitioner's reliance on the Commission's action

in *Taylor* is misplaced. The statements in *Taylor* that were disallowed by the Commission, were made in uncertified copies of complaints filed against the licensee. The Commission found that since the petitioner failed to provide any sworn statements or affidavits of the complainants or any other person having personal knowledge of the facts or attesting to the truthfulness of the charges raised in the complaints, the "hearsay" representations of the attorney, were insufficient to raise a substantial and material question of fact. See, §1.229(d) of the Commission's Rules.

⁵ Under these cases, three criteria are considered-signal population coverage, the size of the suburban community relative to the adjacent city, and the interdependence of the suburban community with the central city.

entitled to a first local service preference and for allotment purposes, the comparison is between Scotland Neck and Rocky Mount. Petitioner further contends that the removal of Station WWRT's channel from Scotland Neck leaves that community without a full-time local station.⁶ Finally, petitioner argues that while the Bureau asserts that Scotland Neck will receive coverage from WWRT's proposed "Pinetops" facility, it failed to analyze the extent to which persons within the coverage area of the current Scotland Neck facility would lose service as a result of the proposed reallocation or the extent to which those persons are presently served by other aural services.

6. In opposing comments, WWRT contends that petitioner's petition for reconsideration is a rehash of old arguments and an attempt to use the Commission's processes to slow the advent of new competition. Regarding Pinetops relationship to Rocky Mount, WWRT reiterates that Pinetops is not part of Rocky Mount, nor is it part of the Rocky Mount Urbanized Area. WWRT contends that RTE has failed to dispute any of the facts on which the Commission's decision was based.⁷

7. In reply comments petitioner argues that WWRT failed to respond to its showing that the reallocation of Station WWRT(FM) from Scotland Neck to Pinetops violates Section 1.420(i) of the Commission's Rules. Instead, petitioner contends that WWRT merely repeats its assertion that Pinetops is a "community" for allotment purposes. Petitioner asserts that in light of the fact that WWRT did not respond to its arguments, the Bureau should accept its unopposed showings on these matters and exclude as unreliable the evidence of Pinetop's independence from Rocky Mount.⁸

8. *Discussion.* After further review and careful consideration of the record in this docket, we believe that the petition for reconsideration filed by petitioner should be denied. First, we disagree that the *R&O* relied on impermissible hearsay statements⁹ to determine that the community of Pinetops was sufficiently independent of Rocky Mount to warrant a first local service preference. While the technical portion of the petitioner's proposal was signed by the technical consultant, petitioner's proposal was signed and submitted by its attorney. Section 1.52 of the Commission's Rules requires that the original of any documents filed with the Commission by a party represented by counsel shall be signed and verified by the party and his/her address stated. If represented by counsel, it must be signed by at least one counsel of record in his individual name.¹⁰

In the absence of such verification, a pleading may be returned as unacceptable. See *Lake City, SC*, 47 FCC 2d 1067 (1974). Since the pleading at issue was signed by an attorney, it was proper to consider the facts presented. In this instance, our view is buttressed by the fact that the petitioner filed no opposition disputing the truthfulness of the alleged hearsay statements. Therefore, in light of the above, the Branch properly relied on the information submitted by the petitioner.

9. With respect to petitioner's second argument, we believe that based on the information provided the Branch Chief did not err in his determination that Pinetops is sufficiently independent of the Rocky Mount Urbanized Area so that Pinetops should not be credited with aural transmission services located in the urbanized area. On the contrary, an application of the *Tuck* factors supports his conclusion that Pinetops warrants a first local service preference. With respect to the first criteria, signal population coverage, the proposed allotment will provide city grade (70dBu) coverage to 100% of Pinetops and the Rocky Mount Urbanized Area.¹¹ While this factor would appear to support attributing the Rocky Mount stations to Pinetops the other two factors as discussed below do not support such a result.

10. Under the second criteria, size of the suburban community relative to the adjacent city, we noted in the *R&O*, that according to the 1990 U.S. Census, Pinetops is not located within the Rocky Mount Urbanized Area nor is it adjacent to the Urbanized Area. Petitioner argues that the *Report and Order* did not sufficiently consider enough information under the second criterion, and we did not take into account the relative size difference between Pinetops and Rocky Mount and the distance between the two communities citing *Fairfield and Norwood, Ohio, supra*. We disagree. In *Fairfield and Norwood*, Norwood was not only located within the Cincinnati Urbanized Area, it was completely surrounded by Cincinnati. Here, none of the above factors exist, the proposed community of Pinetops is located 23.3 kilometers (14.5 miles) southeast of the larger community and is outside the Rocky Mount Urbanized Area. Under these circumstances where the smaller community is so far removed from the boundary of the urbanized area, we do not believe the differential between the central city and smaller community is critical.

11. Regarding the third criteria, interdependence, petitioner has also failed to demonstrate that Pinetops is not an independent community.¹² The test with regards to the

⁶ Petitioner notes that the removal of Pinetops only full-time local service is contrary to the Commission's policy favoring establishment and retention of first local FM services for communities lacking in full-time local aural services, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁷ WWRT notes that Pinetops is: a) an incorporated community; b) has its own local government consisting of five Commissioners; c) served by its own police department and rescue squad; d) has its own public schools; e) has approximately ten churches; f) supports approximately 50 businesses; g) has three manufacturing centers; has its own library and community center.

⁸ RTE also cites the Commission's action in *Van Wert, Ohio and Monroeville, Indiana*, 7 FCC Rcd 6519 (1992).

⁹ Hearsay is defined as testimony concerning an extra hearing statement which is offered in order to establish the truth of the matters asserted therein.

¹⁰ Section 1.401(b) of the Rules concerning rule making pro-

ceedings puts petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification.

¹¹ As we noted in the *R&O* Station WWRT(FM)'s presently authorized facilities already serve 90% of Rocky Mount.

¹² There are eight factors relevant to interdependence: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to

interdependence of the suburban community with the metropolis is not whether such institutions exist, ie: organizations that identify themselves in some geographic component of the urbanized area such as a neighborhood, subdivision or political district, but what they indicate about the relationship between the suburb and the metropolis. See *Eatonstown and Sandy Springs, Georgia*, et al., 6 FCC Rcd 6580 (1991), recon. pend.

12. In evaluating the critical interdependence criteria, "the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criteria - relative size and proximity suggests that the community license is simply an appendage of a large central city." See *Tuck* 3 FCC Rcd at 5378. Here, in order to support its position that Pinetops is not independent from the Rocky Mount area petitioner merely reiterates that Pinetops is not independent from Rocky Mount because Pinetops does not have its own telephone directory provided by the local telephone company. We disagree that this factor alone is dispositive. Pinetops telephone listings are provided on a regional basis by the Carolina Telephone and Telegraph Co. Consequently, there is no local telephone company that provides a separate book for Pinetops or for Rocky Mount. Petitioner further contends that WWRT submitted insufficient evidence to show that it is entitled to a first local service preference. We disagree. While we will consider a number of characteristics in assessing the interdependence of a community with the central city, "our list is not exhaustive, and there is no set of indicia of interdependence that must be shown." As we noted in the *Report and Order*, Pinetops is an incorporated Census Designated Place. Pinetops has its own police and fire services. In addition, Pinetops has its own school systems, religious institutions and businesses. All of the above identify themselves with Pinetops. In *Tuck*, we stated that we would not apply *Huntington* in the absence of persuasive evidence that two communities share needs and interests and that the showing required depends on the degree to which the size and proximity of the pertinent communities suggest that the community of license is simply an appendage of a large central city. We believe that in light of the fact that Pinetops is located approximately 15 miles from Rocky Mount and not located within the Rocky Mount Urbanized area, that petitioner has failed to show that Pinetops was not entitled to a first local service.

13. We continue to believe that the upgrade and reallocation of the Scotland Neck channel to Pinetops is a preferential arrangement of allotments, pursuant to our *Change of Community R&O* and *MO&O.*, because it results in a first local transmission service, triggering Allotment Priority 3. By way of contrast, retaining the channel at Scotland Neck triggers lower allotment priority 4, other public interest factors, since there is already a station licensed to Scotland Neck. Although Station WWRT at Scotland Neck constitutes that community's sole local nighttime transmission service, this does not, in our view, outweigh the higher allotment priority of a first local ser-

vice. See, e.g. *Ravenswood, Chatahoochee*. Our view is further buttressed by the fact that there will also be an improvement in the facilities of Station WWRT because of the related upgrade in its channel resulting in a gain area of 2,535 square kilometers (979.2 square miles).¹³

14. Accordingly, IT IS ORDERED, That this proceeding aforementioned Petition for Reconsideration filed by Radio Triangle East, IS DENIED.

15. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

which the specified community and the central city are part of the same advertising market; and (8) the municipal services such as police, fire protection, schools, libraries. See *KRFC supra*.

¹³ Although there will be a small loss area of 248 square kilometers (95.7 square miles) our concerns about this loss area

are mitigated by the fact that 50% of the population in the loss area will receive 5 or more full-time services, 35% of the population in the loss area will receive 4 full-time services and 15% of the population in the loss area will receive 3 full-time services.